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MEMORANDUM¹

TO: Statutory Revision Committee

FROM: Ed DeCecco, Office of Legislative Legal Services

DATE: March 4, 2022

SUBJECT: Correcting section 39-27-101 (4.2) and (12), C.R.S.

Summary

The definitions for the excise tax on gasoline and special fuel created in article 27 of title 39, C.R.S., are set forth in section 39-27-101, C.R.S. Last year, the Colorado General Assembly enacted H.B. 21-1322 to restructure the gasoline and special fuel tax, and that legislation included two errors in the definitions:

- The definition of "bulk transfer and terminal system" unintentionally omitted a reference to "special fuel" in one portion of the definition, creating an inconsistency in the treatment of gasoline and special fuel in one instance; and
- In relocating a type of aircraft fuel from the definition of "gasoline" to a tax exemption provision, a type of aircraft fuel that continues to be subject to a type of gasoline tax was removed from the bill.

The Department of Revenue identified the defects.

¹ This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS) in the course of its statutory duty to provide staff assistance to the Statutory Revision Committee (SRC). It does not represent an official legal position of the OLLS, SRC, General Assembly, or the state of Colorado, and is not binding on the members of the SRC. This memorandum is intended for use in the legislative process and as information to assist the SRC in the performance of its legislative duties.

Analysis

1. The definition "bulk transfer and terminal system" unintentionally omitted a reference to "special fuel" in one portion of the definition relating to fuel in a railcar creating an unnecessary inconsistency between gasoline and special fuel in a railcar.

H.B. 21-1322 created the following new definition of "bulk transfer and terminal system" in section 39-27-101 (4.2), C.R.S.:

(4.2) "Bulk transfer and terminal system" means the distribution system for gasoline and special fuel consisting of refineries, pipelines, vessels, and terminals. Gasoline or special fuel in the tank of any vehicle or in any trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer and terminal system. Gasoline in any railcar is not in the bulk transfer and terminal system unless it is being transferred from a refinery to a terminal operated by the refiner.

The only time this definition is used is within the definition of a "blender," which means a "person who produces blended gasoline or blended special fuel outside of the bulk transfer and terminal system."² Thus, inclusion or exclusion from the definition of "bulk transfer and terminal system" only impacts when a person can be considered a "blender" and, as a result, be required to pay the excise tax on blended gasoline or blended special fuel under section 39-27-102 (1)(b)(V), C.R.S.

The third sentence of the definition for "bulk transfer and terminal system" establishes that transfers by railcar from a refinery to a terminal operator are included in the definition. This provision does not, however, apply to "special fuel" and this omission is conspicuous. Every other provision mentioned thus far applies to either "gasoline or special fuel" or "gasoline and special fuel," including two other instances in the definition in "bulk transfer and terminal system."

In addition, the omission of "special fuel" makes the comprehensive term "bulk transfer and terminal system" inconsistent with the definitions for the component parts of the term—"bulk transfer" and "terminal." Under section 39-27-101 (32), C.R.S., the definition of "terminal" relates to "gasoline or special fuel," but more importantly, "bulk transfers" are defined, in part, to mean "... any transfer of gasoline *or special fuel* by railcar from a refinery to a terminal operated by the refiner."³ To the extent that the

² § 39-27-101 (4), C.R.S.

³ § 39-27-101 (4.1), C.R.S. (*emphasis added*.)

meaning of "bulk transfer" was intended to be captured in the definition of "bulk transfer and terminal system," then the omission of "special fuel" was clearly a defect.

Thus, every statutory reference included in or related to the definition of bulk transfer and terminal system applies to both gasoline and special fuel, with one omission. This omission was inadvertent and creates a defect within the statute. This defect can be remedied by adding "special fuel" to the last sentence of "bulk transfers and terminal system" as included in the proposed draft.

2. A type of aviation fuel that continues to be taxed was inadvertently removed from the definition of "gasoline."

H.B. 21-1322 also amended the definition of "gasoline" in section 39-27-101 (12), C.R.S., as follows:

(12) "Gasoline" means any flammable liquid used primarily as a fuel for the propulsion of motor vehicles, motor boats, or aircraft. "Gasoline" does not include diesel engine fuel, kerosene, liquefied petroleum gas, OR natural gas. ~~and products, including kerosene, specially prepared, sold, and used in aircraft operated by scheduled air carriers or commuter airline operators exempt from the federal aviation fuels tax; except that "gasoline" does include products, including kerosene, specially prepared, sold, and used in any other aircraft.~~ Except as otherwise provided in this subsection (12), any product ONCE blended with gasoline ~~shall be~~ IS considered gasoline for purposes of the excise tax imposed pursuant to this part 1.⁴

The repealed language was intended to remove the exclusion for "products, including kerosene, specially prepared, sold, and used in aircraft operated by scheduled air carriers or commuter airline operators exempt from the federal aviation fuels tax" from the definition of "gasoline," while simultaneously creating exemptions that applied to the same fuel in section 39-27-102.5 (2.5)(a)(I), C.R.S. In doing so, however, the legislation also inadvertently removed the phrase "except that "gasoline" does include products, including kerosene, specially prepared, sold, and used in any other aircraft."

But the removal of this language is inconsistent with other provisions of the bill. H.B. 21-1322 simultaneously amended another provision that expressly imposes the excise tax on gasoline used in certain aircraft at a special rate distinct from other types of gasoline. Specifically, section 39-27-102 (1)(a)(IV), C.R.S., was amended as follows:

⁴ 2021 Colo. Sess. Laws, ch. 453, p. 2998 and 2999.

(IV) (A) The excise tax imposed by ~~subparagraph (I) of this paragraph (a) shall be~~ SUBSECTION (1)(a)(I) OF THIS SECTION IS six cents per gallon or fraction thereof on gasoline used as fuel for the propulsion of nonturbo-propeller or nonjet engine aircraft and ~~shall be~~ IS four cents per gallon or fraction thereof on gasoline used as fuel for the propulsion of turbo-propeller or jet engine aircraft.⁵

Turbo-propeller or jet engine aircraft only use specially prepared kerosene fuel, and so if the General Assembly had intended to eliminate this type of excise tax, it would have repealed the four-cent tax instead of modernizing the language.

Moreover, if the intent was to exempt kerosene entirely, there would be no reason to create the exemption in section 39-27-102.5 (2)(a)(I), which specifically creates an exemption for "products, including kerosene, specially prepared, sold, and used in aircraft operated by scheduled air carriers or commuter airline operators exempt from the federal aviation fuels tax..."

In light of these conflicting changes, and given there was nothing in the legislative record otherwise demonstrating an intent to discontinue the four-cent tax, the department has indicated that it has determined that the exclusion of "kerosene" from gasoline impliedly does not apply to kerosene specially prepared for, sold for, and used in aircraft, and it will continue to collect the tax on that type of fuel. As such, restoring products, including kerosene, that are used in these types of aircraft to the definition of "gasoline" would harmonize the statutes and cure the statutory defect.

Statutory Charge⁶

The proposed bill fits within the charge of the Statutory Revision Committee because it will modify or eliminate an antiquated, redundant, or contradictory provision of law.

⁵ 2021 Colo. Sess. Laws, ch. 453, p. 2999.

⁶ The Statutory Revision Committee is charged with "[making] an ongoing examination of the statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and recommending "legislation annually to effect such changes in the law as it deems necessary in order to modify or eliminate antiquated, redundant, or contradictory rules of law and to bring the law of this state into harmony with modern conditions." § 2-3-902 (1), C.R.S. In addition, the SRC "shall propose legislation only to streamline, reduce, or repeal provisions of the Colorado Revised Statutes." § 2-3-902 (3), C.R.S.

Proposed Bill

The attached bill corrects the defects in section 39-27-101 (4.2) and (12), C.R.S.

ADDENDUM A

39-27-101. Definitions - construction. As used in this part 1, unless the context otherwise requires:

...

(4) "Blender" means a person who produces blended gasoline or blended special fuel outside of the bulk transfer and terminal system.

(4.1) "Bulk transfer" means any transfer of gasoline or special fuel by pipeline or vessel and any transfer of gasoline or special fuel by railcar from a refinery to a terminal operated by the refiner.

(4.2) "Bulk transfer and terminal system" means the distribution system for gasoline and special fuel consisting of refineries, pipelines, vessels, and terminals. Gasoline or special fuel in the tank of any vehicle or in any trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer and terminal system. Gasoline in any railcar is not in the bulk transfer and terminal system unless it is being transferred from a refinery to a terminal operated by the refiner.

...

(12) "Gasoline" means any flammable liquid used primarily as a fuel for the propulsion of motor vehicles, motor boats, or aircraft. "Gasoline" does not include diesel engine fuel, kerosene, liquefied petroleum gas, or natural gas. Except as otherwise provided in this subsection (12), any product once blended with gasoline is considered gasoline for purposes of the excise tax imposed pursuant to this part 1.

""

(32) "Terminal" means a gasoline or special fuel storage and distribution facility that is supplied by a pipeline, vessel, or refinery, a storage and distribution facility operated by a refiner and supplied by a railcar, or a tank farm from which gasoline or special fuel may be removed for distribution.

Second Regular Session
Seventy-third General Assembly
STATE OF COLORADO

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3.3.22

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LLS NO. 22-0822.01 Ed DeCecco x4216

COMMITTEE BILL

Statutory Revision Committee

BILL TOPIC: "Correct Defects With Gas & Special Fuel Tax"

A BILL FOR AN ACT

101 **CONCERNING THE CORRECTION OF TECHNICAL DEFECTS WITH**
102 **DEFINITIONS THAT RESULTED FROM A RESTRUCTURING OF THE**
103 **GASOLINE AND SPECIAL FUEL TAX IN 2021.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

Statutory Revision Committee. In 2021, the general assembly enacted a law to restructure the gasoline and special fuel tax. As a result of that legislation, there are 2 defects with the definitions used for purposes of the tax. First, within the definition of "bulk transfer and terminal system", which generally applies to gasoline and special fuel,

*Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

there is one reference that only applies to gasoline. The bill adds special fuel to the definition, so that the definition consistently applies to both types of fuel.

Second, the definition of "gasoline" lists fuels that are excluded from the definition. As part of restructuring the fuel tax statutes, the 2021 legislation removed from the list of excluded fuels a certain type of aviation fuel and instead created an exemption that achieved the same effect as the exclusion. In doing so, the legislation also inadvertently removed from the definition of "gasoline" another type of aviation fuel that remains subject to tax at a special rate specifically prescribed by statute for this fuel. This bill adds aviation fuel back to the definition of "gasoline" so that it is clear that the nonexempt fuel continues to be subject to the tax.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 39-27-101, **amend**
3 (4.2) and (12) as follows:

4 **39-27-101. Definitions - construction.** As used in this part 1,
5 unless the context otherwise requires:

6 (4.2) "Bulk transfer and terminal system" means the distribution
7 system for gasoline and special fuel consisting of refineries, pipelines,
8 vessels, and terminals. Gasoline or special fuel in the tank of any vehicle
9 or in any trailer, truck, or other equipment suitable for ground
10 transportation is not in the bulk transfer and terminal system. Gasoline OR
11 SPECIAL FUEL in any railcar is not in the bulk transfer and terminal system
12 unless it is being transferred from a refinery to a terminal operated by the
13 refiner.

14 (12) "Gasoline" means any flammable liquid used primarily as a
15 fuel for the propulsion of motor vehicles, motor boats, or aircraft.
16 "Gasoline" does not include diesel engine fuel, kerosene, liquefied
17 petroleum gas, or natural gas; EXCEPT THAT "GASOLINE" DOES INCLUDE
18 PRODUCTS, INCLUDING KEROSENE, SPECIALLY PREPARED FOR, SOLD FOR,

1 AND USED IN AIRCRAFT. Except as otherwise provided in this subsection
2 (12), any product once blended with gasoline is considered gasoline for
3 purposes of the excise tax imposed pursuant to this part 1.

4 **SECTION 2. Act subject to petition - effective date.** This act
5 takes effect at 12:01 a.m. on the day following the expiration of the
6 ninety-day period after final adjournment of the general assembly; except
7 that, if a referendum petition is filed pursuant to section 1 (3) of article V
8 of the state constitution against this act or an item, section, or part of this
9 act within such period, then the act, item, section, or part will not take
10 effect unless approved by the people at the general election to be held in
11 November 2022 and, in such case, will take effect on the date of the
12 official declaration of the vote thereon by the governor.

